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ADMITTED TO PRACTICE: NY, MA

December 21, 2021

Hon. Janet DiFiore
Chief Judge, New York Court of Appeals
New York State Unified Court System
20 Eagle Street
Albany, NY 12207

Re: New York Pattern Jury Instructions

Dear Chief Judge DiFiore:

We write as counsel for Public.Resource.Org ("Public Resource"), a 501(c)(3) non-profit corporation based in California. The mission of Public Resource is to enhance public access to government information and public law. As you may be aware, Public Resource has made significant strides in pursuit of this mission, including a recent victory at the United States Supreme Court regarding public access to annotated state codes. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). That case makes clear that edicts of government cannot be copyrighted by states and that there is a strong public interest in broad access to such edicts.

We write specifically to urge the State of New York to remove barriers to access that the State has impermissibly put in place with respect to the New York Pattern Jury Instructions — Civil (the "PJI"), developed and promulgated by the Committee on Pattern Jury Instructions (the "Committee"). At present, the PJI can only be accessed by paying a $1,960 fee to a commercial publisher. Even for citizens that can afford the PJI, these materials are not easily accessible to the visually impaired and are hard to find and navigate.

Overview and Background

Our client has made the PJI, and model jury instructions from eighteen other states, publicly available and digitally accessible on the non-profit Internet Archive (https://archive.org) at the following location:

https://archive.org/details/JuryInstructions

The collection offered by Public Resource has several features that make the edicts of government contained therein more useful. Books containing model jury instructions are scanned and then undergo several operations, such as Optical Character Recognition or

"OCR," to convert typed text into machine-coded text. Public Resource uses custom open-source software code to create modern HTML files, making the materials more usable for the visually impaired. In the "subject and topics" pane accessible in the collection, a user may click on a particular state name to find materials for that jurisdiction. There is also the capability to search inside the texts across the entire collection, allowing a user to enter a search term such as "eviction":

https://archive.org/details/JuryInstructions?query=eviction&sin=TXT

The search identifies any volumes containing that search term. When the user clicks on a volume, it will open to the relevant page that contains the term; "pins" below the book identify other pages that have that word or phrase.

Public Resource is working with legal informatics clinics to make the collection even more usable, using big data and machine learning technologies to identify similar jury instructions in different states. By allowing such research efforts, our client expects to see even more improvements in accessibility and usability of the instructions. All of these materials are easily found on the world wide web using search engines such as Google or Bing.

The New York Pattern Jury Instructions

The PJI is an invaluable tool of democracy in the State of New York. In making the PJI accessible to the broader public, Public Resource hopes to facilitate widespread participation in the New York legal system. The jury is a key component of a fair and accessible judicial system in the United States. The widescale availability of the New York Pattern Jury Instructions, therefore, contributes to fair and accessible justice in the State of New York. The PJI constitutes the best plain-language statement of the law as concerns charging of juries in civil cases in the State.

The preface to the Third Edition of the PJI acknowledges that "references to charges by PJI section number, both in the courtroom and in law offices, are now part of the legal culture of the State[.]" The forewords to the PJI convey that it has provided immeasurable benefit to the New York judicial system, and that its value to the public "cannot be overstated." This value can only be fully realized through greater accessibility.

Although litigants are not required by law to use the PJI in New York, its use is common. This widespread use and encouragement is well-justified, given the quality of the PJI. Its integration into the New York judicial system is natural. Because the PJI forms "the basis for each instruction in New York statutory and case law," its goals can only be accomplished through widespread availability to the public.

Edicts of Government Doctrine

As you are no doubt aware, because the PJI was issued in the name of the Unified Court System and created by judges in the course of their judicial duties, it is not eligible for copyright. The American legal system operates on the assumption that every citizen knows the law. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). Thus, it follows that all citizens should have free access to the contents of the law. *Id*. The U.S. Supreme Court has given effect to this principle through the articulation of the government edicts doctrine. *Id*.

The Copyright Act grants monopoly protection for "original works of authorship." 17 U.S.C. § 102(a). Effectively, this means that, to be copyrightable, a work must have a copyright-eligible author. Under the government edicts doctrine, officials empowered to speak with the force of law are not copyright-eligible authors of the works they create in the course of their official duties. *Georgia*, 140 S. Ct. at 1501. Thus, such government work product is excluded from copyright protection. *Id*. at 1504.

The government edicts doctrine, as it exists today, emerged from a trio of Supreme Court cases decided in the 19th century. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

These three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. In our client's recent case against the State of Georgia, the United States Supreme Court extended the application of the government edicts doctrine to include works created by legislators acting in their role as legislators. *Id*. at 1505.

In the 2020 *Georgia* decision, the Court clarified that the relevance of the government edicts doctrine to a particular work rests on the identity of the author rather than whether the work carries the force of law. *Id*. at 1506. Thus, it is not required to determine which materials constitute "the law," because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id*. In effect, this means that the doctrine applies not only to final legislation but also to explanatory and procedural materials that legislators create in their official duties (including but not limited to model jury instructions). *See id.* at 1508.

Under Supreme Court precedent, then, copyright protection cannot exist in works that, like the PJI, are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. *Id.*

The Committee

The PJI was created by judges in the course of their judicial duties. Therefore, it falls under the above framework and is ineligible for copyright protection.

The PJI lays out how five justices and an attorney Reporter endeavored to write the first edition of the New York Pattern Jury Instructions. Starting in 1962, the justices composed the first Committee on Pattern Jury Instructions, a part of the Association of Justices of the Supreme Court of the State of New York.

In the following years, several justices and judges joined the Committee or served as advisors, replacing judges that left the Committee, retired, or passed away. Although innumerable people contributed in part to the PJI, the core of the Committee has always included justices. At the time of publishing of the third edition, the Committee consisted of fifteen justices and associate justices, only six of whom were retired.

A main purpose of the Committee is to help guide trial judges in instructing juries clearly. The authors' dedication to this purpose is indistinct from their judicial duties. Upon entering office, judges swear an oath to administer justice, a core part of which is facilitating participation in the judicial system. The PJI is relevant and highly useful to this goal. Additionally, the creators' experience as judges was a necessary part of their authorship. This experience gives the PJI the authoritative weight it holds today.

For these reasons, the PJI was created as part of its authors' judicial duties. It is therefore ineligible for copyright protection.

Conclusion

The commitment shown by those involved in creating the PJI is a testament to their devotion to the law and public service. The intentions of those involved in the work would be best served through offering public access to these instructions, so that all may benefit from the knowledge that they have thoughtfully shared.

Particularly at a time when our nation's legal system has come under substantial scrutiny from all sides, a commitment to transparency and openness in the law is crucial to restoring public confidence. Those in the legal system should strive to eliminate barriers to information that should be widely available. Removing the claims of copyright protection on the PJI would be an invaluable step in this direction.

We hope you will agree that the entire public should be able to enjoy the benefits of the PJI. Currently, the PJI provides an inaccurate copyright notice that purports to vest ownership in the Unified Court System. For the reasons explained, the PJI is not eligible for copyright protection. Therefore, we ask that you:

1. abandon and withdraw all copyright claims from the PJI as well as from the web site of the Unified Court System; and

2. support efforts to provide public access to these important edicts of government.

Along with Public Resource, we would be more than happy to discuss this with you or your staff. Thank you for your time and attention.

Respectfully submitted,

Christopher T. Bavitz

cc: Hon. Lawrence K. Marks
Chief Administrative Judge, Courts of New York State

Carl Malamud
President, Public Resource

David Halperin
Of Counsel, Public Resource